

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN MICHAEL APODACA,

Defendant and Appellant.

A102522

**(Solano County
Super. Ct. No. FCR174981)**

Brian Michael Apodaca appeals his conviction by jury verdict of second degree murder. (Pen. Code, §§ 187, 189.) He contends the trial court erroneously instructed that violation of Vehicle Code section 2800.2, evading a pursuing police officer while driving with willful and wanton disregard for the safety of people or property, can be the predicate offense for a second degree felony murder conviction because, he argues, violation of this statute is not an inherently dangerous felony. He also contends Vehicle Code section 2800.2 cannot serve as the basis of a second degree felony murder conviction because it conflicts with Vehicle Code section 2800.3, evading a pursuing peace officer and proximately causing death or serious bodily injury. Relying on a rule of statutory construction by which a special statute prevails over a confling general

statute, he reasons that section 2800.3 is the special statute intended to be the exclusive means of punishing his conduct.¹ We affirm.

BACKGROUND

In light of appellant's contentions on appeal, a detailed factual recitation unnecessary. Two California highway patrol officers in a marked patrol car directed appellant onto a frontage road after they observed him speeding and driving erratically on Interstate 80. Appellant, in a stolen car, initially complied with their directive to stop but before the officers got out of their car to approach him, he fled from them along the frontage road, driving upwards of 90 miles per hour. The officers pursued him in their patrol car, with its siren and all flashing lights activated. As they did so, appellant abruptly turned off the road and drove up the embankment and through the barbed wire fence that separates the frontage road from Interstate 80. His act caused his car to become airborne in front of a "big rig" (full-sized tractor pulling two trailers) traveling in Interstate 80's slow lane. The big rig braked to avoid appellant, skidded to the left, and jackknifed at the interstate's center divider. As the big rig skidded, it struck a minivan, killing the minivan driver, and collided with a pickup truck. The big rig driver and the pickup truck driver and his passenger were injured in the collision.

DISCUSSION

I. Inherently Dangerous Felony.

The jury was instructed on two theories of second degree murder: implied malice and felony murder based on the violation of Vehicle Code section 2800.2.² Appellant contends the court erred in instructing that he could be found guilty of second degree murder if the killing occurred during the commission of a section 2800.2 violation because a section 2800.2 offense is not an inherently dangerous felony.

¹The Supreme Court has granted review of *People v. Howard* (2002) 99 Cal.App.4th 43 (review granted Sept. 11, 2002, No. S108353), which rejected both these arguments. On March 15, 2004, the Court of Appeal, Third Appellate District, filed *People v. Williams* (2004) 116 Cal.App.4th 1114, 1121-1125 (Morrison, J. dissenting), which held that section 2800.2 is not a felony inherently dangerous to human life.

² All further section references are to the Vehicle Code.

“Under the second degree felony-murder doctrine, a homicide is second degree murder if it is committed in the perpetration or attempted perpetration of any felony that is inherently dangerous to human life. [Citations.]” (*People v. Sewell* (2000) 80 Cal.App.4th 690, 693.) To determine whether a felony is inherently dangerous, courts look to the elements of the felony in the abstract, not to the specific conduct of the defendant. (*Ibid.*) “A felony is inherently dangerous if ‘by its very nature, it cannot be committed without creating a substantial risk that someone will be killed. . . .’ [Citation.]” (*Ibid.*)

Section 2800.2 states: “(a) If a person flees or attempts to elude a pursuing peace officer . . . and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished by imprisonment in the state prison, or by confinement in the county jail for not less than six months nor more than one year. The court may also impose a fine of not less than one thousand dollars (\$1,000) nor more than ten thousand dollars (\$10,000), or may impose both that imprisonment or confinement and fine. [¶] (b) For purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs.”

Appellant contends that section 2800.2’s inclusion of wanton disregard for the safety of “*property*” as well as “persons” precludes a finding that, in the abstract, the statute constitutes a felony inherently dangerous to human life. *People v. Johnson* (1993) 15 Cal.App.4th 169 (*Johnson*) rejected this contention. “[G]iving the statutory language involving ‘wanton disregard’ for the safety of ‘persons or property’ a commonsense construction, it appears the ‘wanton disregard’ in question is total, rather than selective. That is, the disregard is for everything, whether living or inanimate. [¶] . . . [A]part from the ‘wanton disregard’ element, one must also be engaged in the act of fleeing from a pursuing peace officer whose vehicle is displaying lights and sirens. Any high-speed pursuit is inherently dangerous to the lives of the pursuing police officers. In

even the most ethereal of abstractions, it is not possible to imagine that the ‘wanton disregard’ of the person fleeing does not encompass disregard for the safety of the pursuing officers. In short, it does not appear that the phrase ‘or property’ may properly be construed to limit the mental state of the offender, and thus to make fleeing a pursuing police vehicle other than ‘inherently dangerous.’” (*Id.* at p. 174.)

Appellant contends that subdivision (b), added to section 2800.2 in 1996 after the 1993 *Johnson* opinion, confirms that the statute can be violated without inherent danger to human life because the statute now includes conduct that does not involve a high probability of death, e.g., many of the violations itemized in section 12810.³ By providing this alternative basis for a section 2800.2 violation, he argues the Legislature has repudiated *Johnson’s* construction of the statutory language “wanton disregard.”

People v. Sewell, supra, rejected this contention. It concluded that the 1996 amendment adding subdivision (b) “did not change the elements of the section 2800.2 offense, in the abstract, or its inherently dangerous nature. The amendment merely described a couple of nonexclusive acts that constitute driving with willful or wanton disregard for the safety of persons or property. The key elements of the crime remain: the offense is committed by one who, ‘while fleeing or attempting to elude a pursuing peace officer,’ drives his pursued vehicle in ‘a willful or wanton disregard for the safety of persons or property.’ [Citations]. Thus, the logic of *Johnson* [*People v. Johnson, supra*, 15 Cal.App.4th at p. 173] remains.” (*Sewell, supra*, 80 Cal.App.4th at pp. 694-695.)

Appellant contends *Johnson* and *Sewell* were wrongly decided. However, we find their reasoning persuasive and adopt it as our own. We thus conclude there was no instructional error.

II. *Applicability of Section 2800.3*

Appellant contends section 2800.2 cannot be used as the predicate offense for his second degree felony murder conviction because the Legislature intended the special

statute, Section 2800.3,⁴ evasion of a peace officer causing death or serious bodily injury, to apply to his offense. Therefore, he argues, his second degree felony murder conviction cannot stand because section 2800.3 is not an inherently dangerous felony for purposes of the second degree felony murder rule.

When one statute treats a subject generally, and another statute treats the same subject specially, the special statute will prevail in its application to the subject matter. (*Riley v. Forbes* (1924) 193 Cal. 740, 745.) In other words, if the general statute, standing alone, would encompass the same matter as the special statute, and thus conflict with it, the special statute will be considered an exception to the general statute. (*In re Williamson* (1954) 43 Cal.2d 651, 654.) The “special over general” rule applies only where “each element of the ‘general’ statute corresponds to an element on the face of the [special] statute” or “it appears from the entire context that a violation of the ‘special’ statute will necessarily or commonly result in a violation of the ‘general’ statute. . . .” (*People v. Jenkins* (1980) 28 Cal.3d 494, 502.)

Appellant accurately notes that section 2800.3 has been construed as unavailable to serve as the predicate offense for application of the second degree felony murder doctrine. (*People v. Sanchez* (2001) 86 Cal.App.4th 970, 974; *People v. Jones* (2000) 82 Cal.App.4th 663, 666.) However, as *Sanchez* observed, the language of section 2800.2 differs significantly from that of section 2800.3. (*Id.* at p. 980.) Section 2800.2 requires the pursued vehicle to be driven “in a willful or wanton disregard for the safety of

³ Section 12810 assigns a violation point count for conviction of, inter alia, failure to stop in the event of an accident, driving under the influence, reckless driving, driving the wrong way on a divided highway, driving in excess of 100 miles per hour.

⁴ Vehicle Code section 2800.3 states: “Whenever willful flight or attempt to elude a pursuing peace officer. . . proximately causes death or serious bodily injury to any person, the person driving the pursued vehicle, upon conviction, shall be punished by imprisonment in the state prison for three, four, or five years, by imprisonment in the county jail for not more than one year, or by a fine of no less than two thousand dollars (\$2,000) nor more than ten thousand dollars (\$10,000), or by both that fine and imprisonment. [¶] For purposes of this section, ‘serious bodily injury’ has the same meaning as” Penal Code section 243, subdivision (f)(4).”

persons or property.” Section 2800.3 does not contain any similar element. Its dispositive elements can be satisfied by conduct that does not necessarily pose a high probability of death, insofar as it can be violated by driving a pursued vehicle and proximately causing “serious bodily injury” as the phrase is defined in Penal Code section 243, e.g., loss of consciousness, concussion, bone fracture. Thus, section 2800.3 does not constitute a felony inherently dangerous to human life for purposes of the second degree murder rule. (*Sanchez, supra*, 86 Cal.App.4th at pp. 979-980.) Because violation of section 2800.3 will not “necessarily or commonly result” in a violation of section 2800.2, the “special over general” rule is inapplicable here. (*People v. Jenkins, supra*, 28 Cal.3d at p. 502.)

DISPOSITION

The judgment is affirmed.

Jones, P.J.

We concur:

Simons, J.

Gemello, J.